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No. 89-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO and CHARLES J. HUTTINGER,

Petitioners,

v.

FRANK LANDRY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Plaintiffs' brief in opposition ("Opp. Br.") offers nothing to undercut the compelling grounds for plenary review identified in the ALPA/Huttinger petition ("Pet.").

A. Plaintiffs' only response to the demonstrated direct conflict between the lower court's application of RICO and this Court's labor law decisions, Pet. at 10-17, is to assert the uncontested but irrelevant proposition that unions are subject to RICO. Opp. Br. at 12, 15-17. What plaintiffs fail to counter is our showing, Pet. at 10-16, 18-19, that Congress, in targeting certain labor offenses

as RICO predicate acts, did not include union derelictions in collective bargaining, which are subject instead to the duty of fair representation ("DFR"). Yet, as plaintiffs concede, Opp. Br. at 14, it is just such dissatisfaction with union performance in negotiations which is *the* subject of their RICO complaint.[1] By permitting plaintiffs to substitute RICO for the DFR as the appropriate measure of union conduct in this area, the court below effectively eviscerates the body of law which this Court and the lower courts have carefully crafted to delineate the boundaries and principles applicable to union representational conduct.

Nor can the conflict posed by the decision below be explained away, *contra* Opp. Br. at 17, by pointing to the inclusion of mail fraud[2] as a RICO predicate act. Indeed, the application of mail fraud here underscores the conflict, because it supplies norms which are fundamentally at odds with those which animate federal labor

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[1] In sharp contrast to the union conduct at issue here, the challenged conduct in the two RICO cases involving unions which plaintiffs cite, Opp. Br. at 15 n.6, concerned widespread criminal union activity unconfined to collective bargaining negotiations.

Moreover, virtually all of "The Facts" set forth at Opp. Br. 3-8 lack record support, and plaintiffs offer none. For example, plaintiffs' assertion that ALPA representative Huttinger "lost his status to negotiate, to vote, to represent the union," Opp. Br. at 4, was found by the court below to conflict with the uncontroverted evidence. App. A, 46a-47a. Plaintiffs' claim that it was only this Court's denial of certiorari in *Air Line Pilots Ass'n, Int'l* v. *TACA Int'l Airlines, S.A.*, 748 F.2d 965, which prompted the execution of a written retirement plan in April 1985, Opp. Br. at 7, is spurious: certiorari was not denied until mid-May 1985. 471 U.S. 1100 (1985). Because these and numerous other factual misstatements do not "have a bearing on the question of what issues would properly be before the Court if certiorari were granted," Sup. Ct. R. 15.1, we refrain from burdening the Court with a line-by-line refutation of plaintiffs' bald assertions.

[2] The mail and wire fraud statutes are treated together as "mail fraud."

law. For example, in implementing the substantive standards and remedial principles which define the DFR, the lower courts have uniformly required an aggrieved employee to demonstrate a direct causal nexus between a union's misrepresentation and the harm averred; that "but for" the union's misconduct, plaintiff would not have been injured.[3] By contrast, mail fraud arguably requires no proof of detrimental reliance upon the misrepresentation at issue.[4]

Federal labor law principles are further undermined by the Fifth Circuit's willingness to permit state law, through the mail fraud statute, to serve as the substantive measure of union conduct in collective bargaining. Pet. at 14-15. Plaintiffs' attempt to square this approach with the well-established preemptive force of the DFR and ERISA, Pet. at 13, 16-17, again misses the mark, for it is the "state common law of fraud", App. A, 50a n.87—not "generally applicable state criminal laws," Opp. Br. at 24 (quoting 29 U.S.C. § 1144(b)(4))—which would provide the substantive standard for the mail fraud claim under the lower court's formulation.[5]

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[3] *Acri* v. *International Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir.), *cert. denied*, 479 U.S. 816 (1986); *Anderson* v. *United Paperworkers Int'l Union*, 641 F.2d 574, 579-80 (8th Cir. 1981); *Deboles* v. *Trans World Airlines, Inc.*, 552 F.2d 1005, 1018-19 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *Self* v. *International Bhd. of Teamsters*, 620 F.2d 439, 443 (4th Cir. 1980); *see also Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 572 (1976).

[4] *E.g.*, *Armco Indus. Credit Corp.* v. *SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986).

[5] Plaintiffs' contention, Opp. Br. at 13-14, that federal labor law is somehow inapplicable here because the relocation of the pilot base ended the ALPA/TACA bargaining relationship is inconsistent with the allegations of the complaint that defendants violated federal labor law in negotiating the relocation. App. A, 5a-6a, 47a. The assertion is also legally unfounded as the severing of an employer/union bargaining relationship is subject to federal labor law. *E.g.*, *TACA Int'l Airlines, S.A.*, 748 F.2d at 967; *Buckholtz* v. *Swift & Co.*, 609 F.2d 317, 319 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980).

Plaintiffs' response also misperceives the inherent inconsistency between the Fifth Circuit's approach and established principles of labor and criminal law construction. Pet. at 17-21. Contrary to plaintiffs' suggestion, Opp. Br. at 18, the Fifth Circuit did not confine its application of 18 U.S.C. § 664 to the "[u]nauthorized use of property" of a pension fund, but instead expansively construed that criminal enactment to reach *any* breaches of the fiduciary duties imposed by ERISA or § 501(a) of the LMRDA, 29 U.S.C. § 501(a), even though such statutory violations are not RICO predicate acts and do not otherwise carry criminal sanctions.[6]

Plaintiffs have thus offered nothing to dispel the clear effect of the ruling below: an individual who dislikes the job his union has done for him at the bargaining table can circumvent the comprehensively articulated body of DFR law including the time constraints within which DFR claims must be pursued, and yet reap three-times the monetary relief, simply by changing the labels he attaches to his claim from a breach of the DFR to a violation of RICO. Review by this court is needed to prevent the dismantling of significant federal labor law principles and their established interrelationship with criminal law.[7]

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[6] By subjecting unions to standards other than those which they could reasonably anticipate would apply to their collective bargaining performance, and by its expansive construction of RICO predicate acts, the Fifth Circuit's decision raises due process concerns. *See Firestone* v. *Galbreath*, No. C2-89-0840, at *67-*69 (S.D. Ohio July 3, 1990) (LEXIS, Genfed library, Dist file); *cf. H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 109 S.Ct. 2893, 2909 (1989) (Scalia, J., concurring) ("predictability in RICO's civil application is particularly important").

[7] Plaintiffs' request that, in the event the petition is granted, Opp. Br. at 21-22, this Court should "consider" the Fifth Circuit's holding that they could not state a predicate act under section 302

B. Plaintiffs' opposition fails to minimize the direct conflict with decisions of this Court and lower courts presented by the Fifth Circuit's determination that plaintiffs offered sufficient evidence of a continuing threat of racketeering to withstand summary judgment based solely upon (1) Huttinger's continued receipt of retirement benefits long after the conclusion of the alleged racketeering scheme, and (2) ALPA's having been named as a defendant in a second RICO lawsuit, involving a different airline and employees, *Adair* v. *Air Line Pilots Ass'n, Int'l*, No. 86-C-1939 (D. Colo. dismissed Jan. 11, 1988), notwithstanding that the other lawsuit had already been dismissed. Pet. at 21-24.

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of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186, is untimely, 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1, contrary to Sup. Ct. R. 14 and 15.2 ("brief in opposition shall not be joined with any other pleading"), and legally unfounded. As the Fifth Circuit correctly observed, App. A, 47a, the LMRA excludes from its coverage Railway Labor Act ("RLA") employers, employees and their representatives. 29 U.S.C. §§ 142(3), 152(2), (3) [statutory text is found in the appendix to the brief of ALPA/Huttinger in opposition to plaintiffs' cross-petition for certiorari (No. 90-189)]; *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376 (1969); *Fechtelkotter* v. *Air Line Pilots Ass'n, Int'l*, 693 F.2d 899, 903 n.8 (9th Cir. 1982); *United States* v. *Davidoff*, 359 F. Supp. 545, 547-48 (E.D.N.Y. 1973).

Plaintiffs' new claim that ALPA and TACA breached RLA "duties" beyond those addressed by their DFR/breach of contract claim, Opp. Br. at 14, is not properly before the Court. Had it been raised in the complaint, it would be time-barred, as was their hybrid claim, App. A, 18a, under the six-month limitations period applicable to claims alleging RLA violations. *Coyle* v. *Brotherhood of Ry. Clerks*, 838 F.2d 1404, 1406 (5th Cir. 1988); *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 56-57 (1st Cir. 1987); *Hogan* v. *Brotherhood of Ry. Clerks*, 817 F.2d 248, 250 (4th Cir. 1987) (per curiam); *International Ass'n of Machinists* v. *Aloha Airlines, Inc.*, 790 F.2d 727, 735-36 (9th Cir.), *cert. denied*, 479 U.S. 931 (1986); *Robinson* v. *Pan Am World Airways, Inc.*, 777 F.2d 84, 89 (2d Cir. 1985); *Brotherhood of Locomotive Eng'rs* v. *Atchison, T. & S.F. R.R.*, 768 F.2d 914, 919 (7th Cir. 1985).

Even if plaintiffs were suffering "continuing harm" from Huttinger's continued receipt of benefits, Opp. Br. at 20 (an assertion for which no record support is cited or exists), that alone would not provide the necessary "threat of continued *racketeering activity*" by defendants, *H.J. Inc.*, 109 S. Ct. at 2902 (emphasis added), which, in any event, cannot be shown here since the alleged RICO scheme ended with the relocation of the pilot base. App. A, 47a, 58a-59a.

The pernicious consequences of the Fifth Circuit's approach to RICO's continuity requirement is underscored by plaintiffs' argument that ALPA's "continuing threat" can also be demonstrated by "[s]imilar allegations of wrongdoing . . . lodged by other pilots" in non-RICO actions. Opp. Br. at 20 & n.10. Even if continuing unlawful activity by ALPA could be said to be evidenced by these other lawsuits—and judgment was entered *for ALPA* in four of the six cases cited [8]—that would not demonstrate the requisite threat of continuing *racketeering activity*. *H.J. Inc.*, 109 S.Ct. at 2902; *McEvoy Travel Bureau, Inc.* v. *Heritage Travel, Inc.*, 904 F.2d 786, 794 n.14 (1st Cir. 1990) (allegation of a pattern of unlawful acts which are not RICO predicate acts does not establish a RICO pattern). Moreover, because the claims in *Barthelemy, Burkevich, Haerum* and *E.E.O.C.* v. *Air Line Pilots Ass'n, Int'l*, like those in *Adair*, were summarily rejected, plaintiffs surely cannot piggyback on the allegations in those cases to satisfy their burden here under Fed. R. Civ. P. 56 of producing evidence of a disputed issue of fact concerning the continuity element. *See Lujan* v. *National Wildlife Fed'n*, 110 S.Ct. 3177, 3186 (1990); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S.

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[8] *Barthelemy* v. *Air Line Pilots Ass'n*, 897 F.2d 999 (9th Cir. 1990); *Burkevich* v. *Air Line Pilots Ass'n, Int'l*, 894 F.2d 346 (9th Cir. 1990); *Haerum* v. *Air Line Pilots Ass'n*, 892 F.2d 216 (2d Cir. 1989); *E.E.O.C.* v. *Air Line Pilots Ass'n, Int'l*, 661 F.2d 90 (8th Cir. 1981).

242, 248-52 (1986). But that incongruous result, in clear derogation of Rule 56 and decisions of this Court, Pet. at 21-22, is precisely the risk posed by the ruling below.

C. Plaintiffs suggest no way of avoiding the substantial conflict between the Fifth Circuit's ruling that ERISA fiduciary obligations may attach prior to "establishment" of an ERISA plan and two extensive bodies of case law: one following the lead of *Donovan* v. *Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*), concerning the requisites which must be satisfied before a plan is "established" so as to be subject to ERISA,[9] and a second, emanating from decisions of this Court, and holding that ERISA obligations do not apply to unions and employers in their negotiation, establishment and design of collectively-bargained plans. Pet. at 26 & n.22. Nor do plaintiffs even address the severe threat to retirement plans, employees and beneficiaries, see Pet. at 26-28, created by the Fifth Circuit's decision to penalize employers and unions who, in furtherance of the objectives of ERISA and encouraged by the tax laws, provide that their retirement plans, once established, shall be retroactively effective.

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[9] *Brown* v. *Ampco-Pittsburgh Corp.*, 876 F.2d 546, 551 (6th Cir. 1989), should be added to the list of cases (Pet. at 25 n.20) which have followed *Dillingham*.

Plaintiffs concede, Opp. Br. at 22, that prior to April 1985 only two of the four *Dillingham* requirements for establishment of an ERISA plan (identification of class of beneficiaries and of the source of financing) were met.

CONCLUSION

For the reasons stated above and in the certiorari petition, the writ should issue.

Respectfully submitted,

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